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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ARTHUR AUERBACH,

Plaintiff and Appellant,

v.

TRANSAMERICA OCCIDENTAL LIFE
INSURANCE CO., et al.,

Defendants and Respondents.

B200628

(Los Angeles County
Super. Ct. No. BC363798)

APPEAL from an order of the Superior Court of Los Angeles County,
William F. Highberger, Judge. Affirmed.

Law Offices of Robert K. Scott, D. Scott Mohnery; Law Offices of Randy D. Curry
and Randy D. Curry for Plaintiff and Appellant.

Morrison & Foerster, Dan Marmalefsky and Monica L. Scheetz for Defendant and
Respondent Transamerica Occidental Life Insurance Co.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Joseph C. Campo, and
Allison A. Arabian for Defendants and Respondents Larry M. Halpern and New
Insurance Marketing, Inc.

INTRODUCTION

Plaintiff Arthur Auerbach appeals from an order of dismissal entered after the trial court sustained demurrers, without leave to amend, of defendants Transamerica Occidental Life Insurance Company (Transamerica), Larry M. Halpern, and New Insurance Marketing, Inc. (NIMI) to Auerbach's complaint for negligent misrepresentation and intentional misrepresentation. We conclude that the trial court correctly sustained the demurrers without leave to amend. On appeal Auerbach proposed to amend the complaint by alleging that when purchasing two \$500,000 Transamerica life insurance policies, he was told that the policies were "vanishing premium" policies and that he would pay five annual premiums of \$5,020 and thereafter would pay no further premiums. The policies contained provisions which contradicted these representations and stated that he was required to pay premiums after the fifth policy year to keep the policy in force. These policy provisions put Auerbach on notice of defendant Halpern's alleged misrepresentations, and thus his cause of action accrued, and the statutory limitations period commenced, when the policy was issued. Because Auerbach filed his complaint after the statutory limitations period had ended, his complaint was untimely. We further conclude that the trial court correctly denied leave for Auerbach to amend his complaint. We affirm the order of dismissal.

FACTUAL AND PROCEDURAL HISTORY

On December 21, 2006, plaintiff Arthur Auerbach filed a complaint for negligent misrepresentation and intentional misrepresentation against defendants Transamerica, Halpern, and NIMI. After Transamerica filed a demurrer to the complaint, Auerbach filed a first amended complaint on March 29, 2007. An amended complaint supersedes all prior complaints, and this reviewing court will consider only the final complaint on which the trial court ruled. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.) Transamerica again demurred to the first amended complaint, and NIMI and Halpern joined Transamerica's demurrer.

Pursuant to the standard of review,¹ the first amended complaint contained the following allegations. Auerbach began a business relationship with Halpern, an agent for Transamerica, in 1990. With Transamerica's knowledge, Halpern "twisted" Auerbach away from his existing life insurance policy to sell him Transamerica insurance policies which defendants fraudulently advised were better insurance products. In fact, the Transamerica policies did not adequately meet Auerbach's needs. To generate front end commissions for NIMI and himself, Halpern fraudulently canceled existing policies covering Auerbach and caused Auerbach to purchase replacement policies that failed to adequately meet Auerbach's specific insurance requests and needs. Auerbach requested, and Halpern promised, policies with consistent and unchanging premium payments. Halpern and NIMI sold two Transamerica individual life insurance policies, each with face amounts of \$500,000, with issue dates of March 21, 2003. The complaint attached copies of these two policies. Halpern falsely promised Auerbach that premiums for the policies would remain unchanged throughout the life of the policies.

On September 14, 2006, Transamerica wrote a letter, responding to a California Department of Insurance investigation, advising Auerbach that the insurance policies, contrary to what Halpern promised, were "interest sensitive" products and a premium shortfall required significant additional premiums to make up for Transamerica's interest income shortfall. Until Transamerica's September 14, 2006, letter, Transamerica had never advised Auerbach that Halpern's promises were untrue. The complaint alleged that nothing in the policies caused Auerbach to discover that Halpern's promises were untrue until September 2006 or advised Auerbach that he had purchased "interest sensitive" products requiring significant additional premiums to make up for Transamerica's

¹ A demurrer tests the legal sufficiency of factual allegations in a complaint. (*Title Ins. Co. v. Comerica Bank -- California* (1994) 27 Cal.App.4th 800, 807.) "Our task in reviewing a judgment of dismissal following the sustaining of . . . a demurrer is to determine whether the complaint states, or can be amended to state, a cause of action. For that purpose we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may properly be judicially noticed." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

interest shortfall. The complaint alleged that Transamerica never advised Auerbach that he could not rely on Halpern's representations or that the Transamerica policies did not conform to Halpern's promises when he sold them to Auerbach.

Auerbach's negligent misrepresentation cause of action alleged that defendants, through Halpern, represented that they would provide life insurance meeting Auerbach's specific requirements, by canceling existing policies and "churning" policies defendants sold to Auerbach. Halpern falsely promised that changing policies was required to meet Auerbach's needs. Through Halpern, defendants promised Auerbach that premiums for the policies would remain unchanged and consistent throughout the life of the policies. Auerbach justifiably relied on Halpern's and other defendants' misrepresentations and purchased the policies, paid premiums, and did not seek coverage elsewhere. Auerbach was justified in relying on Halpern's representations, as he represented himself as a knowledgeable agent licensed in California to transact the business of insurance. Auerbach alleged that defendants made these false representations with no reasonable grounds for doing so, for the purpose of defrauding him, and with intent to induce Auerbach to purchase insurance policies and pay premiums on them. Auerbach alleged that had he known the facts, he would not have purchased the policies.

Auerbach's second cause of action for intentional misrepresentation made the same allegations as the negligent misrepresentation cause of action, but also alleged that defendants intended their conduct to cause injury to Auerbach or that defendants' conduct was despicable conduct carried on with a willful and conscious disregard of Auerbach's rights and subjected him to cruel and unjust hardship in conscious disregard of his rights; and was intentional misrepresentation, deceit, or concealment of a material fact known to defendants with the intention to deprive Auerbach of property or legal rights or to otherwise cause injury such as to constitute malice, oppression or fraud under Civil Code section 3294, entitling Auerbach to punitive damages.

On April 12, 2007, Transamerica filed demurrers to Auerbach's first amended complaint. Transamerica alleged that the applicable statutes of limitations and the parole evidence rule barred Auerbach's claims, and that Auerbach could not prove justifiable

reliance, a required element of both negligent and intentional misrepresentation. Defendants Halpern and New Insurance Marketing joined Transamerica's demurrer.

Auerbach's opposition alleged that the statute of limitations did not bar his complaint, because his complaint pleaded that he first discovered defendants' fraud three months before filing his complaint, which was within the three year limitations period of Code of Civil Procedure section 338, subdivision (d).² Auerbach's opposition also argued that the parole evidence rule did not preclude evidence of the parties' intent, and that defendants' statement that Auerbach could not prove justifiable reliance had no importance at the pleading stage.

On May 4, 2007, the trial court sustained defendants' demurrer without leave to amend. On May 22, 2007, an order of dismissal dismissing the action was filed.

On July 11, 2007, Auerbach timely filed a notice of appeal.

ISSUES

Auerbach claims on appeal that:

1. The trial court abused its discretion by sustaining the demurrer without leave to amend;
2. The written terms of the policies did not affect the "churning" and "twisting" allegations;
3. Newly discovered additional facts, articulated in the hearing on the demurrer, warranted leave to amend; and
4. The bar of the statute of limitations was not apparent on the face of the first amended complaint.

² Unless otherwise specified, statutes will refer to the Code of Civil Procedure.

DISCUSSION

1. *Because the Insurance Policies Gave Notice to Auerbach That Policy Provisions Contradicted the Description of the Policy and Promises Made to Him by Halpern, the Statute of Limitations Bars the Complaint*

Plaintiff claims that the bar of the statute of limitations was not apparent on the face of the first amended complaint. Plaintiff cites the rule that “[i]n order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.” (*McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874.)

a. *The Statutory Limitations Periods*

Determining whether statutory limitations periods bar plaintiff’s claims requires answering two questions: (a) What statutes of limitations govern the plaintiff’s claims; and (b) when did plaintiff’s causes of action accrue. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Section 338, subdivision (d) establishes a three-year limitations period for an action for relief on the ground of fraud, which includes an action for intentional misrepresentation. (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 955.) A cause of action for negligent representation is also subject to this three-year limitations period, unless the gravamen of the action is negligence, in which it is subject to a two-year limitations period. (*Ventura County Nat. Bank v. Macker* (1996) 49 Cal.App.4th 1528, 1530-1531.)

Section 338, subdivision (d) states that a cause of action for fraud “is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Auerbach claims he did not discover facts constituting the fraud until he received Transamerica’s September 14, 2006, letter advising him that contrary to what Halpern promised, the insurance policies were “interest sensitive” products and significant, additional premiums were required to make up for Transamerica’s interest income

shortfall. His complaint also alleged that until he received this letter in September 2006, Transamerica never advised him that Halpern's promises were untrue, that he could not rely on Halpern's representations, or that the Transamerica policies did not conform to Halpern's promises to Auerbach when he sold the Transamerica policies to him. During oral argument in this appeal, plaintiff's counsel proposed to amend the complaint to allege that when he purchased the Transamerica life insurance policies, he was told that these policies were "vanishing premium" policies, and that after five premiums of \$5,020, he would pay no further premiums.

"When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) This court may consider a proposed amendment made at oral argument. (*Bassett v. Lakeside Inn, Inc.* (2006) 140 Cal.App.4th 863, 870.)

Defendants contend that the Transamerica policies gave Auerbach notice that the policies contradicted Halpern's promises and representations, that such notice caused his causes of action to accrue, that the statutory limitations period began to run when the policies were issued on March 21, 2003, and therefore the statute of limitations barred his complaint filed on December 21, 2006.

Auerbach's complaint attached the Transamerica insurance policies. This court considers matter shown in exhibits attached to the complaint and incorporated by reference, and we accept as true the contents of the exhibits when they conflict with allegations of the complaint. (*Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 665.) An insurance policy should be read as a lay person would read it, not as an attorney or insurance expert would analyze it. (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1209; Civ. Code § 1644.)

The issue therefore becomes whether, given Auerbach's amended allegation that he was told that the insurance policies were "vanishing premium" policies and that after paying five premiums of \$5,020 he would owe no further premiums, the insurance policies contradicted this information, gave him notice that the policies had been misrepresented to him, and caused the statutory limitations period to commence.

b. *Provisions of the Insurance Policies Gave Notice to Auerbach That He Had to Pay Premiums after Policy Year Five to Keep the Policy in Effect*

The first pages of Transamerica policies 0060102451 and 0060102452 identified the policies as "Adjustable Life Insurance," and stated: "Minimum premium requirement shown in the policy data[,] flexible premiums payable thereafter during life of insured prior to age 100." This information states that premiums are payable during the insured's life before age 100, and thus clearly contradicts any representation that premium payments ended after five years.

The "Policy Summary" states: "You must pay at least the minimum premium per year during the Required Premium Period [of five years] and maintain certain policy values or your policy will Lapse or be changed to Paid-Up Life Insurance. If you request an increase in the face amount of this policy, you must also pay at least the minimum premium per year for the increased portion for that portion's Required Premium Period following the date of the increase, or your policy will Lapse or be changed to Paid-Up Life Insurance. After that, you may vary the amount of premiums and how often you pay them, within certain limits, as described in the Premiums provision. *Generally, you may pay premiums as long as the insured is living*, up to the policy anniversary at Age 100." (Italics added.) This Policy Summary clearly states that the insured pays premiums as long as the insured is living, up to age 100. Thus it contradicts any representation that the insured would pay premiums for only five years.

Similarly, the "Premiums" portion of the policy states that the insured must pay the required premium for the base policy for the five-year required premium period. "At the end of each policy year in the Required Premium Period, we will calculate the cumulative total of all Gross Premiums paid for the Base Policy, less any refunds, Partial

Surrenders and Surrender Penalty Free Withdrawals [taken from that Layer]. This amount must equal or exceed the cumulative sum of the Required Premium for the Base Policy for the number of policy years completed, or your policy will enter the Grace Period.” The policy further states: “If you stop paying premiums after the Required Premium Period, your coverage will continue until the Net Cash Value is insufficient to pay the Monthly Deduction due. At that time, your policy will enter the Grace Period.” The policy defines grace period, and further states: “If this policy enters the Grace Period, we will let you know by sending you a Notice. The Notice will tell you the amount you must pay to keep the policy in force. You must pay this amount before the Grace Period ends. *If you do not pay enough, this policy will Lapse at the end of the 61 days* subject to the Nonforfeiture Options provision.” (Italics added.)

A provision in the “Nonforfeiture Options” section of the policy similarly states: “If you stop paying premiums after any Required Premium Period, your coverage will continue until the Cash Value minus any loan is insufficient to pay the Monthly Deduction due. At that time, this policy will enter the Grace Period.”

A “Table of Guaranteed Maximum Monthly Deduction Rates per \$1,000 for Base Policy” shows a monthly deduction rate of 0.1533 in policy year 1, rising to a monthly deduction rate of 83.3333 in policy year 35. The policy defines “monthly deduction” as “an amount we withdraw from the Accumulation Value of the policy . . . at the beginning of each policy month.”

The Policy Data also states: “Current monthly deduction rates, policy fees and expense charges are not guaranteed after policy year 6, nor are they estimates for the future.”

Since the maximum monthly deduction rate rises, and after year 6 the policy fees and expense charges also rise, it is clear that a failure to pay premiums after year 5 would cause the accumulation value of the policy to fall to zero. The “Table of Policy Values and Benefits” confirms this conclusion, since the planned annualized premium is \$5,020 for each of the first five policy years, but the accumulation value rises from \$1,015 in year one to \$1,782 in year three, but declines to \$1,359 in year four and \$514 in year five.

The table gives no amounts for year six or thereafter, but the trend is clear: in year six if the insured pays the \$5,020 premium, or pays no premium, the accumulation value will fall below zero. The policy defines “accumulation value” as “equal to all Net Premiums paid for the policy[.]” The failure to pay premiums therefore would cause the policy to terminate. The policy states: “This policy will terminate at the earliest of: [¶] 1. the date of your Written Request to surrender or terminate; or [¶] 2. the date of Lapse.” The policy defines “lapse” to mean “termination of the policy at the end of the Grace Period due to insufficient premium, unloaned Accumulation Value or unloaned Cash Value.” Thus the policy indicates that if premiums are not paid or are not sufficient, the policy will terminate. A statement on the “Policy Data” page reiterates: “This policy may terminate if: . . . the cash value³ minus any loan(s) is less than the monthly deduction due[.]”

We therefore conclude that the policy contradicted representations to Auerbach that he would only have to pay five annual premium payments of \$5,020 and thereafter would not have to pay any further annual premiums. Consequently the policy placed him on notice that misrepresentations had occurred when he purchased the policy, and his cause of action accrued upon issuance of the policy on March 21, 2003. Therefore his complaint, filed on December 21, 2006, was barred by the three-year statutory limitations period of section 338, subdivision (d).

2. Auerbach Has Not Shown Error in the Trial Court’s Denial of Leave to Amend

Auerbach claims that newly discovered additional facts, presented to the trial court at the hearing on the demurrer, warranted the grant of leave to amend the complaint.

Auerbach made two new allegations in the hearing on the demurrer. First, Auerbach’s counsel newly alleged that Auerbach’s name on the insured’s application form was forged. Auerbach’s counsel stated to the trial court that his client had only recently informed him, after opposition to the demurrers was filed, that his signature was

³ The policy defines “cash value” as “the Accumulation Value less any applicable Surrender Penalty.” Alternately stated, “The difference between the accumulation value and the cash value is the surrender penalty.”

forged. Second, Auerbach's counsel stated that Auerbach informed him he did not believe the insurance policies were issued to him until months after the March 21, 2003, issue dates. Auerbach's counsel could not provide the trial court with a specific date on which Auerbach claimed that the policies were delivered to him.

As to the forgery allegation, plaintiff had twice filed complaints alleging that his complaints attached "true and correct" copies of the insurance policies purchased from Halpern. He did not explain to the trial court, and provides no explanation in this appeal, why the discovery was made only after the opposition to the demurrer was filed and why examination of the insurance policies, which were in Auerbach's possession for several years, did not reveal the purported forgery. Where plaintiff could not explain the pleading of inconsistent allegations, the trial court was entitled to conclude that the proposed allegation was a sham and to refuse to grant leave to amend. (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390-1390.)

With regard to the allegation that the policies were delivered to him after their March 21, 2003, issue date, the plaintiff bears the burden of showing that a reasonable possibility exists that amendment could cure defects in the complaint. Allegations must be factual and specific, not vague or conclusionary. (*Rakestraw v. California Physicians' Service, supra*, 81 Cal.App.4th at pp. 43-44.) In the trial court, Auerbach was unable to provide a date on which he claimed the policies were delivered to him, and could only say the policies were delivered to him "months" after the March 21, 2003, issue date. The vagueness of the allegation supported the trial court's denial of leave to amend. Plaintiff offers no further facts on appeal showing that there is a reasonable possibility of amendment. Denial of leave to amend the complaint to allege a later delivery date of the insurance policies therefore was not an abuse of discretion.

3. *The Statute of Limitations Barred "Churning" and "Twisting" Allegations in Auerbach's Complaint*

Auerbach claims that the written insurance policies did not affect the "churning" and "twisting" allegations in his complaint, and thus the statutory limitations period did not commence as to those allegations when the policies were issued.

Auerbach's complaint alleged that to generate front end commissions for defendant NIMI and for himself, Halpern began fraudulent "churning" practices, canceling existing policies covering Auerbach and causing Auerbach to purchase replacement policies which failed to meet his specific insurance requests and needs. Auerbach's complaint also alleged that Halpern "twisted" Auerbach away from his existing life insurance policies in order to sell him Transamerica insurance policies which defendants fraudulently advised were better insurance policies, when in fact they did not meet Auerbach's needs.

Based on our analysis of the policy provisions, *ante*, the policies did give notice to Auerbach that Halpern allegedly fraudulently canceled Auerbach's existing policies and caused him to purchase replacement policies that did not meet his requests and needs, and that Halpern allegedly "twisted" Auerbach away from his existing life insurance policies and sold him Transamerica insurance policies that defendants fraudulently advised were better policies. An allegation of "twisting" is essentially an action for common law misrepresentation. (*Kentucky Cent. Life Ins. Co. v. LeDuc* (N.D.Cal. 1992) 814 F.Supp. 832, 837.) The complaint does not specify Halpern's fraudulent "churning" and "twisting" practices, except to say that they caused Auerbach to purchase "replacement policies which failed to adequately meet Plaintiff's specific insurance requests and needs, as Plaintiff requested and Defendant Halpern promised policies with consistent and unchanging premium payments." Auerbach's proposed amendment of the complaint, to allege that Auerbach was told the policies were "vanishing premium" policies and was promised that after five premiums of \$5,020 he had no further premiums to pay, further specifies Halpern's churning and twisting practices. As we have concluded, however, the policies gave Auerbach notice that they did not meet his specific insurance requests and needs, i.e., that the policies did not correspond to the representations that after paying five premiums of \$5,020 Auerbach would have no further premiums to pay. We find that the policies themselves put Auerbach on notice of Halpern's fraudulent churning and twisting practices, and therefore the statute of limitations barred those allegations.

Conclusion

Our finding that the statute of limitations barred Auerbach's complaint makes it unnecessary to reach Auerbach's claims that the parole evidence rule did not bar his fraud claims and that he was entitled to prove that he justifiably relied on Halpern's representations. We conclude that the trial court correctly sustained the demurrers to the complaint without leave to amend.

DISPOSITION

The order of dismissal is affirmed. Costs on appeal are awarded to defendants.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.